

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RECHO BURNS,

Defendant-Appellant.

UNPUBLISHED

October 25, 2002

No. 231399

Wayne Circuit Court

LC No. 00-001758

Before: Meter, P.J., and Saad and R.B. Burns*, JJ.

METER, P. J. (*Dissenting.*)

I respectfully dissent because I conclude that the jury instructions deprived defendant of a fair trial. I would reverse defendant's conviction and remand this case for a new trial.

The trial court instructed the jury before deliberations that the prosecutor, in order to obtain a felony-murder conviction, must prove that defendant killed "intending to rob the victim." This was an incorrect instruction. See generally *People v Bonds*, 159 Mich App 754, 756; 407 NW2d 9 (1987) (a jury "may not find [the] malice [required for a felony-murder conviction] from the mens rea required to commit the underlying felony").

The trial court subsequently gave the correct instruction during deliberations. As noted in *People v Morey*, 230 Mich App 152, 160 n 4; 583 NW2d 907 (1998), "it is well settled that where a court gives both a correct and an incorrect instruction, this Court presumes that the jury followed the incorrect charge." See also *People v Clark*, 340 Mich 411, 418; 65 NW2d 717 (1954), *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1996), *People v Johnson*, 52 Mich App 560, 562-563; 218 NW2d 65 (1974), and *People v Neumann*, 35 Mich App 193, 195-196; 192 NW2d 345 (1971). This rule holds true even if the latter as opposed to the former instructions contained the correct rule of law. See generally *Clark, supra* at 418.

In *People v Shipp*, 68 Mich App 452, 456; 243 NW2d 18 (1976), the Court, in reversing the defendant's conviction, stated that "there were no additional instructions given to repudiate

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the erroneous one.” Here, similarly, the court did not specifically repudiate the prior, erroneous instruction.¹ Thus, I conclude that a new trial is warranted in the instant case.

I acknowledge the existence of *People v Woodfork*, 47 Mich App 631; 209 NW2d 829 (1973). In that case involving an insanity defense, the trial court initially told the jury that after the defendant presented evidence of insanity, a duty arose whereby the prosecutor had to prove the defendant’s sanity by a fair preponderance of the evidence. *Id.* at 634. The court later stated numerous times the correct proposition that the prosecutor was required to prove the defendant’s sanity beyond a reasonable doubt and not merely by a fair preponderance of the evidence. *Id.* at 634-635. This Court cited the principle from *Neumann*, *supra* at 195-196, but then stated the following in upholding the defendant’s conviction:

However, the contested instruction in this case was only incorrect in that it did not completely describe the prosecution’s burden of proof. The whole charge to the jury, and specifically those portions quoted above, are not necessarily inconsistent with the contested instruction and serve to augment and clarify what was intended. [*Woodfork*, *supra* at 636.]

Woodfork provides some support for upholding defendant’s conviction in the instant case. However, *Woodfork* relied on the fact that “the contested instruction in this case was only incorrect in that it did not completely describe the prosecution’s burden of proof.” *Id.* at 635-636. Here, the earlier “intent to rob” instruction was not merely an incomplete statement but an independently incorrect one. Moreover, Supreme Court case law takes precedence over the *Woodfork* decision. See, e.g., *Clark*, *supra* at 418. Accordingly, I believe reversal of the instant conviction is required.

I would reverse and remand.

/s/ Patrick M. Meter

¹ I cannot agree with the majority that the erroneous instruction given here was “corrected or otherwise cured” by the further statements of the court. See *People v Kanar*, 314 Mich 242, 253; 22 NW2d 359 (1946) (“if an erroneous instruction is given on a material matter and the error is not corrected or cured in the charge such error must be regarded as prejudicial”). Indeed, the court did not specifically repudiate the earlier erroneous instruction but merely gave the jurors *another* instruction that contradicted the earlier one.